Bato Bagi & Ors v Government of the State of Sarawak

HIGH COURT (KUCHING) — SUIT NO 22–74 OF 2000–II
ABDUL AZIZ ABDUL RAHIM J
28 APRIL 2008

Civil Procedure — Summary judgment — Application for — Under O14A of the Rules of the High Court 1980 — Whether issues raised suitable to be decided on affidavits of parties without trials — Whether native customary rights are question of fact to be decided on totality of evidence

Native Law and Custom — Land dispute — Customary rights over land — Whether s 5(3) and (4) of the Sarawak Land Code infringe or violate arts 5(1), 8, 13 and 153 of the Federal Constitution and art 39 of the State Constitution of Sarawak and void — Whether plaintiffs entitled to alternative remedy of damages and adequacy of damages for extinguishment of native customary rights over land

The plaintiffs who were residents of Ulu Balui, Belaga District Kapit Division Sarawak ('Ulu Balui') claimed to have native customary rights ('NCR') over lands along Batang Balui and its tributaries ('the land'). These alleged NCR over the land were extinguished pursuant to the Land Direction (extinguishment of Native Customary Rights (No 26) 1997 ('the directions') made by the Minister for Resource Planning in Sarawak in the Government *Gazette* dated 17 June 1997 and operative on 23 June 1997. The plaintiffs were suing on behalf of themselves and all other residents of Ulu Balui on the grounds, inter alia, that the direction made pursuant to s 5(3) and (4) of the Sarawak land Code ('the Code') violated the plaintiffs' fundamental rights under art 5(1) of the Federal Constitution ('Constitution') and/or art 8 of the Constitution and/or art 13(2) of the Constitution and that it was therefore void and unconstitutional. The plaintiffs had therefore claimed, inter alia, for a declaration that the purported extinguishment of the plaintiffs' NCR was void or alternatively for a declaration that each of the plaintiffs was entitled to adequate reasonable compensation for those respective parcels of the land which had been impaired, restricted or extinguished by the defendant for the purpose of the Bakun Hydroelectric Project. This was the defendant's application under O 14A r 1 of the Rules of the High Court 1980 ('RHC') to decide four main issues of law as preliminary issues which will eventually dispose of this dispute between the plaintiffs and the defendant. The first issue was whether s 5(3) and (4) of the Code infringe or violate arts 5(1), 8,

13 and 153 of the Constitution and art 39 of the State Constitution of Sarawak and are therefore void; whether having regard to the facts and law the plaintiffs were entitled to a declaration that the direction was void; whether the plaintiffs were entitled to an order that the defendant vacate the land claimed by the plaintiffs; and whether the plaintiffs were entitled to the alternative remedy of damages and the adequacy of damages for extinguishment of the NCR over the land. The plaintiffs submitted that the issues posed by the defendant were not appropriate for determination under O 14A and that the O 14A procedure is not suitable where issues of facts were involved. The plaintiffs further submitted that the land was not just a source of livelihood but constituted life itself for the plaintiffs in that it was fundamental to the social, cultural and spiritual survival of the native people and therefore the precise nature of such NCR was a question of fact to be decided on the totality of the evidence. However, the defendant submitted that the issue of NCR was no longer a live issue because in both the indorsements on the re-re-amended statement of claim and the amended statement of claim the plaintiffs had abandoned their claim for the declaration of the NCR over the land. As such the defendant contended that the consideration of the issues raised by way of the O 14A application did not require any further investigation into the facts of the case as contended by the plaintiffs. In the amended statement of claim the plaintiffs were challenging the extinguishment of their NCR by the direction made pursuant to s 5(3) and (4) of the Code. The plaintiffs questioned the legality and constitutionality of the direction in view of the fact that the defendant did not accord the plaintiffs any procedural fairness before the extinguishment was made. Before the merits of the defendant's application could be considered it was necessary to decide whether this application was fit and proper for determination under O 14A of the RHC.

Held, allowing the defendant's application with costs:

(1) From the amended statement of claim it was obvious that the plaintiffs no longer sought a declaration that they have NCR over the subject land. In the re-amended statement of claim this prayer which was originally there was deleted, thereby indicating that the plaintiffs were no longer pursuing the declaratory remedy on this issue and had in fact abandoned it. The law is settled and clear that the parties are bound by their pleadings. As such, the plaintiffs should not be allowed or ought not to be allowed to adduce any evidence as to the existence of NCR over the land. In any case, the existence of NCR over the land must be taken to be there and recognised by the defendant before the publication by gazette notification of the Ministerial direction to extinguish it. If this were not so there would be no necessity for the defendant to issue a direction to extinguish the same (see para 14).

(2) Upon applying the established principles and after having regard to the pleadings in this case, it was clear that the issues posed by the defendant for determination in this application were appropriate to be determined as preliminary issues that will eventually dispose of the matter. The material facts that were required for such determination were sufficiently pleaded in the pleadings (see para 22).

(3) It is crystal clear from reading s 5(3) of the Code that customary rights may be extinguished provided that compensation or alternative replacement land with the same rights is made available to any persons whose NCR are affected by the direction. Therefore the Code permits the extinguishment of NCR with provisions for compensation. Article 13(1) of the Constitution provides that no person shall be deprived of property save in accordance with the law. The laws that would apply in this case would be the Code and in particular s 5(3) and (4) of the Code which govern the extinguishment of NCR (see paras 28–29).

(4) Article 13(2) of the Constitution uses the expression 'adequate compensation' whereas the proviso to s 5(3) of the Code uses the simple expression 'compensation'. However, this in itself cannot make the provision unconstitutional. Compensation for acquisition of property and compensation for deprivation for use of property as in the case of extinguishment of NCR ought to be on a different basis. Section 5(3) and (4) of the Code can be saved from being struck down as unconstitutional for violating art 13(2) of the Constitution by reading the expression 'compensation' in that section to mean 'adequate compensation'. This is permissible not only because the Court of Appeal had done so but also because the obligation to provide for and pay compensation is already embodied in that section. When faced with the issue of constitutionality of a provision of a statute the court should be slow in striking down the impugned provisions for being unconstitutional. Instead the court should attempt to harmonise the impugned provisions to bring it in line with the provisions of the Constitution. Also it is a cannon of construction of statutes that where there is inconsistency between two statutory provisions the interpretation of the purported inconsistency must be done in such a way as to harmonise the two provisions (see paras 24, 31 & 33).

(5) Articles 5 and 13 of the Constitution ought to be read together and given a harmonious interpretation to avoid any repugnancy or conflict. When read together the two articles would mean that where a person is deprived of property, but not his life or liberty, even though that property may be important to his livelihood, the deprivation of the property is not unconstitutional so long as there is adequate compensation for his loss of property which would take into account the loss of use of the property from which he may be able to deprive his livelihood (see para 34).

(6) There was no issue of s 5(3) and (4) of the Code being discriminatory and therefore violating art 8 of the Constitution. Neither were there any merits to the argument that s 5(3) and (4) of the Code are in violation of art 153 of the Constitution and art 39 of the State of Sarawak Constitution. The two articles do not deal with the rights of natives on their land which had been acquired or extinguished by the government. Therefore s 5(3) and (4) of the Code are not unconstitutional (see paras 35–37).

(7) The right to the land in the instant case was a communal right and not an individual right. Though the impugned provisions of the Code do not have any provision for the natives to be consulted or heard before the Minister decides to extinguish the NCR and make a Ministerial direction to that effect by publishing it in the *Gazette*, it does not render the provision unconstitutional. The decision to extinguish the NCR under impugned provisions is an exercise of an administrative discretion depending on the exigency and expediency of the state. Land development and planning for land use in the state is the prerogative of the state. The state needs to act with speed and expediency and this speed would be lost if the state is required to accord a right to be heard to every native who claims to have rights to use state land over which NCR is said to subsist. As such, under the impugned provisions of the Code, the state is not obliged to accord the natives the right to be heard before issuing the direction to extinguish the NCR. Accordingly therefore the direction made under the impugned provisions extinguishing the NCR over the plaintiffs' land was lawful and valid and not void for being unconstitutional (see para 46–49).

(8) The Ministerial direction in this case was made in 1997 but the plaintiffs filed this suit only in 2000 without providing any explanation for the delay. The declaration being a discretionary remedy was therefore not granted since the plaintiffs delayed seeking relief (see para 57).

[Bahasa Malaysia summary

Plaintif-plaintif adalah penduduk Ulu Balui, Belaga Daerah Bahagian Kapit Sarawak ('Ulu Balui') menuntut mempunyai hak adat anak negeri ('NCR') ke atas tanah di sepanjang Batang Balui dan cawang sungainya ('tanah tersebut'). NCR yang didakwa ke atas tanah tersebut dihapuskan berikutan Arahan Tanah (Penghapusan Hak Adat Anak Negeri (No 26) 1997) ('arahan tersebut') yang dibuat oleh Menteri Pembangunan Sumber Sarawak di dalam *Warta* Kerajaan bertarikh 17 Jun 1997 dan beroperasi pada 23 Jun 1997. Plaintif-plaintif menyaman bagi pihak mereka dan penduduk Ulu Balui yang lain atas alasan, antara lain, bahawa arahan yang dibuat berikutan s 5(3) dan

(4) Kanun Tanah Sarawak ('Kanun tersebut') mencabuli hak-hak asasi plaintif-plaintif di bawah perkara 5(1) Perlembagaan Persekutuan ('Perlembagaan') dan/atau perkara 8 Perlembagaan dan/atau perkara 13(2) Perlembagaan dan oleh itu ia tidak sah dan tidak berperlembagaan. Plaintif-plaintif oleh itu menuntut, antara lain, untuk perisytiharan penghapusan NCR plaintif-plaintif tersebut tidak sah atau secara alternatif untuk perisytiharan bahawa setiap plaintif berhak kepada pampasan yang wajar untuk bidang tanah masing-masing yang telah dikurangkan, dihalang atau dihapuskan oleh defendan bagi tujuan Projek Hydroelektrik Bakun. Ini adalah permohonan defendan di bawah A 14A k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk menentukan empat isu utama undang-undang sebagai isu-isu permulaan yang akhirnya akan mematahkan pertikaian di antara plaintif-plaintif dan defendan. Isu pertama adalah sama ada s 5(3) dan (4) Kanun tersebut melanggar atau mencabuli perkara-perkara 5(1), 8, 13 dan 153 Perlembagaan dan perkara 39 Perlembagaan Negeri Sarawak dan oleh itu tidak sah; sama ada mengambilkira fakta dan undang-undang, plaintif-plaintif berhak kepada perisytiharan bahawa arahan tersebut tidak sah: sama ada plaintif-plaintif berhak kepada perintah bahawa defendan mengosongkan tanah yang dituntut oleh plaintif-plaintif; dan sama ada plaintif-plaintif berhak kepada remedi alternatif ganti rugi dan kecukupan ganti rugi untuk penghapusan NCR ke atas tanah tersebut. Plaintif-plaintif berhujah bahawa isu-isu yang kemukakan oleh defendan adalah tidak wajar untuk penentuan di bawah A 14A dan bahawa prosedur A 14A tidak sesuai di mana isu-isu fakta terlibat. Plaintif-plaintif selanjutnya berhujah bahawa tanah tersebut bukan sahaja sumber pendapatan tetapi membentuk kehidupan dengan sendirinya untuk plaintif-plaintif di mana ia adalah asas kepada kehidupan sosial, budaya dan rohaniah orang-orang anak negeri dan oleh itu sifat tepat NCR adalah persoalan fakta untuk ditentukan atas keseluruhan keterangan. Walau bagaimanapun, defendan berhujah bahawa isu NCR bukan lagi menjadi isu kerana di dalam kedua-dua pengindorsan di atas pernyataan tuntutan terpinda yang dipinda dan pernyataan tuntutan yang dipinda, plaintif-plaintif telah menghentikan tuntutan mereka untuk perisytiharan NCR ke atas tanah tersebut. Oleh itu, defendan berhujah bahawa pertimbangan isu-isu yang dibangkitkan melalui permohonan A 14A tidak memerlukan apa-apa siasatan lanjut terhadap fakta kes seperti yang dihujahkan oleh plaintif-plaintif. Di dalam pernyataan tuntutan yang dipinda, plaintif-plaintif mencabar penghapusan NCR mereka oleh arahan yang dibuat berikutan s 5(3) dan (4) Kanun tersebut. Plaintif-plaintif mempersoalkan kesahan dan keperlembagaan arahan tersebut memandangkan fakta bahawa defendan tidak memberikan plaintif-plaintif apa-apa keadilan prosedur sebelum penghapusan dibuat. Sebelum merit permohonan defendan boleh dipertimbangkan ia adalah perlu untuk menentukan sama ada permohonan ini adalah betul untuk penentuan di bawah A 14A KMT.

Diputuskan, membenarkan permohonan defendan dengan kos:

(1) Daripada pernyataan tuntutan yang dipinda adalah jelas bahawa plaintif-plaintif bukan lagi memohon untuk perisytiharan bahawa mereka mempunyai NCR ke atas tanah tersebut. Di dalam pernyataan tuntutan yang dipinda dua kali, permohonan ini yang mana asalnya dipadamkan, oleh itu menunjukkan bahawa plaintif-plaintif bukan lagi memburu remedi perisytiharan atas isu ini dan sebenarnya telah menghentikannya. Undang-undang adalah nyata dan jelas bahawa pihak-pihak terikat oleh pliding mereka. Oleh itu, plaintif-plaintif tidak patut dibenarkan atau patut tidak dibenarkan untuk mengemukakan apa-apa keterangan terhadap kewujudan NCR ke atas tanah tersebut. Walau bagaimanapun, kewujudan NCR ke atas tanah tersebut mesti diambil kira terdapat di situ dan diterima oleh defendan sebelum penerbitan melalui pemberitahuan warta oleh arahan Kementerian untuk menghapuskannya. Jika ini tidak berlaku, tidak perlu untuk defendan mengeluarkan arahan untuk menghapuskannya (lihat perenggan 14).

(2) Dengan mengaplikasikan prinsip-prinsip yang ditetapkan dan setelah mengambilkira pliding di dalam kes ini, ia adalah jelas bahawa isu-isu yang dikemukakan oleh defendan untuk penentuan di dalam permohonan ini adalah wajar untuk ditentukan sebagai isu-isu permulaan yang akan akhirnya menentukan perkara tersebut. Fakta material yang diperlukan untuk penentuan sedemikian secara cukup diplid di dalam pliding (lihat perenggan 22).

(3) Ia adalah jelas daripada membaca s 5(3) Kanun tersebut bahawa hak adat boleh dihapuskan dengan syarat bahawa pampasan atau alternatif tanah yang diganti dengan hak yang sama disediakan kepada sesiapa yang NCRnya terjejas oleh arahan tersebut. Oleh itu Kanun tersebut membenarkan penghapusan NCR dengan peruntukan untuk pampasan. Perkara 13(1) Perlembagaan memperuntukkan bahawa tiada seorang pun boleh dilucutkan hartanya kecuali mengikut undang-undang. Undang-undang akan beraplikasi di dalam kes ini adalah Kanun tersebut dan khususnya s 5(3) dan (4) Kanun tersebut yang mengawal penghapusan NCR (lihat perenggan 28–29).

(4) Perkara 13(2) Perlembagaan menggunakan ungkapan 'adequate compensation' manakala proviso kepada s 5(3) Kanun menggunakan ungkapan mudah 'compensation'. Walau bagaimanapun, ini dengan sendirinya tidak boleh menjadikan peruntukan tersebut tidak berperlembagaan. Pampasan untuk milikan hartanah dan pampasan untuk kehilangan kegunaan hartanah seperti di dalam kes penghapusan NCR sepatutnya atas alasan yang berbeza. Seksyen 5(3) dan (4) Kanun boleh diselamatkan daripada pembatalan kerana tidak berperlembagaan kerana mencabuli perkara 13(2) Perlembagaan dengan membaca

ungkapan 'compensation' di dalam seksyen tersebut untuk memberi makna 'adequate compensation'. Ini dibenarkan bukan sahaja kerana Mahkamah Rayuan telah berbuat demikian tetapi kerana obligasi untuk memperuntukkan dan membayar pampasan telahpun termaktub di dalam seksyen tersebut. Apabila bersemuka dengan isu perlembagaan peruntukan statut mahkamah sepatutnya lambat dalam membatalkan peruntukan yang dipersoalkan tersebut sebagai tidak berperlembagaan. Sebaliknya mahkamah sepatutnya cuba untuk menyelaraskan peruntukan-peruntukan yang dipersoalkan tersebut untuk menjadikannya selari dengan peruntukan-peruntukan Perlembagaan. Juga ia adalah hukum pentafsiran statut bahawa, jika terdapat ketidakselarian di antara dua peruntukan statut pentafsiran, ketidakselarian yang dikatakan harus dilakukan dengan cara untuk menyelaraskan kedua-dua peruntukan tersebut (lihat perenggan 24, 31 & 33).

(5) Perkara-perkara 5 dan 13 Perlembagaan mesti dibaca bersama dan diberikan pentafsiran yang selaras untuk mengelakkan sebarang tentangan atau konflik. Apabila dibaca bersama kedua-dua perkara akan membawa makna bahawa apabila seseorang kehilangan hartanah, tetapi bukan nyawa atau kebebasan, walaupun hartanah tersebut mungkin penting untuk saraannya, kehilangan hartanah tersebut bukan tidak berperlembagaan selagi terdapat pampasan yang memadai untuk kehilangan hartanah tersebut yang akan mengambilkira kehilangan kegunaan hartanah daripada mana beliau mungkin boleh kehilangan saraannya (lihat perenggan 34).

(6) Tidak ada isu bahawa s 5(3) dan (4) Kanun menjadi berdiskriminasi dan oleh itu mencabuli perkara 8 Perlembagaan. Juga tidak terdapat merit dalam hujahan bahawa s 5(3) dan (4) Kanun adalah mencabuli perkara 153 Perlembagaan dan perkara 39 Perlembagaan Negeri Sarawak. Kedua-dua perkara tidak berkaitan dengan hak-hak anak negeri ke atas tanah mereka yang telah diperoleh atau dihapuskan oleh kerajaan. Oleh itu s 5(3) dan (4) Kanun adalah berperlembagaan (lihat perenggan 35–37).

(7) Hak ke atas tanah tersebut di dalam kes ini adalah hak bersama dan bukan hak individu. Walaupun peruntukan yang dipersoalkan di dalam Kanun tidak membuat apa-apa peruntukan untuk anak negeri dirunding atau didengar sebelum Menteri membuat keputusan untuk menghapuskan NCR dan membuat arahan Ministerial terhadapnya dengan mengumumkannya di dalam warta, ia tidak menjadikan peruntukan tersebut tidak berperlembagaan. Keputusan untuk menghapuskan NCR di bawah peruntukan yang dipersoalkan tersebut adalah pelaksanaan budi bicara pentadbiran bergantung kepada keterdesakan dan kewajaran negeri tersebut. Pembangunan dan

perancangan tanah untuk menggunakan tanah di dalam negeri adalah prerogatif negeri. Negeri perlu bertindak dengan segera dan wajar dan kesegeraan akan hilang jika negeri diperlukan untuk memberi hak untuk didengar kepada setiap anak negeri yang menuntut mempunyai hak untuk menggunakan tanah di atas mana NCR dikatakan wujud. Oleh yang demikian, di bawah peruntukan Kanun yang dipersoalkan tersebut, negeri tidak diperlukan untuk memberikan anak-anak negeri hak untuk didengar sebelum memberikan arahan untuk penghapusan NCR. Oleh itu, arahan yang dibuat di bawah peruntukan yang dipersoalkan tersebut yang menghapuskan NCR terhadap tanah plaintif-plaintif adalah sah dan tidak batal atas alasan tidak berperlembagaan (lihat perenggan 46–49).

(8) Arahan Menteri di dalam kes ini dibuat pada tahun 1997 tetapi plaintif-plaintif memfailkan guaman ini hanya pada tahun 2000, tanpa memberikan sebarang penjelasan tentang kelewatan tersebut. Perisytiharan tersebut sebagai remedi mengikut budi bicara, oleh itu, tidak diberikan kerana plaintif-plaintif lewat untuk mendapatkan relief (lihat perenggan 57).]

Notes

For cases on application for summary judgment, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7056–7104.

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 652–659.

Cases referred to

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22 (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257 (refd)

Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155 (refd)

E (a Minor) v Dorset CC [1995] 2 AC 633 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481 (refd)

Jalang Anak Paran & Anor v Government of the State of Sarawak & Anor [2007] 1 MLJ 412 (folld)

Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289 (folld)

Kerajaan Negeri Terengganu v Petroliam Nasional Bhd & Anor [2003] 1 MLJ 260 (refd)

Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152 (refd)

Korso Finance Establishment Anstalt v John Wedge [Unreported, February 15, 1994, CA Transcript No 94/387] (refd)

Mohamed v Commissioner of Lands & Mines, Terengganu & Anor [1968] 1 MLJ 227 (distd)

A *Pemungut Hasil Tanah Daerah Barat Daya (Balik Pulau) Pulau Pinang v Kam Gin Paik & Ors* [1983] 2 MLJ 390 (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8 (refd)
Ridge v Baldwin [1963] 2 All ER 66 (refd)
Rockwin Enterprises Ltd v Shui Yee Ltd [2003] 3 HKC 174 (refd)
B *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487 (refd)
State of Bihar & Ors v Bihar Distillery Ltd AIR 1997 SC 1511 (refd)
Sundralingam v Ramanathan Chettiar [1967] 2 MLJ 211 (refd)
Superintendent of Lands and Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256 (folld)
C *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (refd)
Teh Guan Teik v Inspector General of Police & Anor [1998] 3 MLJ 137 (refd)
Tengku Razaleigh bin Tengku Mohd Hamzah v Election Judge For Election Petition No 33–6–1995 & Ors [1996] 4 MLJ 66 (folld)
D *X (Minors) v Bedfordshire County Council* [1995] 3 All ER 353 (refd)

Legislation referred to

Aboriginal Peoples Act 1954 ss 11, 11(1), 11(2), 12
Constitution of the State of Sarawak arts 39(1), 39(2)
E Federal Constitution arts 5(1), 8, 13, 13(2), 153
Government Proceedings Act 1956 s 29(1)(b)
Rules of the High Court 1980 O 14A, O14A r 1, O 33, O33 r 2, O 53
Rules of the Supreme Court [UK] O 14A
Sarawak Land Code ss 5(1)(i), 5(3), 5(3)(a), 5(3)(b), 5(4)

F *Paul Raja (Sagau, Raja & Co) (Raja Aziz Addruse with him) (Meena Raman & Partners) for the plaintiffs.*
Fong Joo Chung (State Counsel) (Joseph Chioh Hock Hua with him) (State Legal Officer, Attorney General's Chambers) for the defendant.

G **Abdul Aziz Abdul Rahim J:**

[1] Vide an application by summons in chambers (encl 93) the defendant applied for determination of certain preliminary issues under O 14A of the
H Rules of the High Court 1980 ('RHC'). Datuk Fong Joo Chung, the former State Attorney General represented the defendant and he was assisted by Mr Joseph Chioh, the State Legal Officer. YM Raja Aziz Addruse appeared for the plaintiffs together with Mr Paul Raja.

I **[2]** The plaintiffs suing on behalf of themselves and on behalf of and as representing all other residents of Uma Balui Ukap at Batu Kalo, Uma Lesong at Batu Keling, Uma Bakah at Long Bulan, Rumah Kulit at Long Jawe and Rumah Ukit at Long Ayak, all of Ulu Balui, Belaga District Kapit Division Sarawak as at 23 June 1997 who have native customary rights over lands

along Batang Balui and its tributaries Belaga District Kapit Division Sarawak ('the land') aver that the extinguishment of the plaintiffs' native customary rights over the said lands by the Land Direction (Extinguishment of Native Customary Rights) (Kawasan Kebanjiran Bakun II) (No 26) 1997 ('the directions') is void, inter alia, for the following reasons:

(a) The direction violates the plaintiffs' fundamental rights under art 5(1) of the Federal Constitution, and/or art 8 of the Federal Constitution and/or art 13(2) of the Federal Constitution;

(b) The direction is in violation of art 39(1) and (2) of the Constitution of the State of Sarawak and/or art 153 of the Federal Constitution;

(c) The direction is made pursuant to s 5(3) and (4) of the Sarawak Land Code, which are void and unconstitutional as being in violation of art 5(1) of the Federal Constitution and/or art 8 of the Federal Constitution and/or art 39(1) and (2) of the Constitution of the State of Sarawak and/or art 153 of the Federal Constitution.

[3] The plaintiffs therefore claimed, against the defendant, for a declaration that s 5(3) and (4) of the Sarawak Land Code (Cap 81) are void. The plaintiffs also sought a declaration that the purported extinguishment of the plaintiffs' native customary rights pursuant to the direction made by the Minister for Resource Planning in Sarawak by the Government *Gazette* dated 17 June 1997 and operative on 23 June 1997 is void; and that the defendant and their servants or agents vacate the plaintiffs' land. The plaintiffs also prayed for an order that the Director of Lands and Surveys Sarawak expunge from his records relating to the plaintiffs' land all entries of the above said extinguishment. Alternatively, the plaintiffs' claimed for a declaration that each of the plaintiff and the persons they represent as owner or holder of native customary rights over their respective parcels of the lands, is entitled to adequate compensation for those portions of their respective parcels of the lands which had been impaired, restricted or extinguished by or on behalf of the defendant for the purpose of the Bakun Hydroelectric Project and that the defendant do pay to the plaintiffs and the persons that they represent reasonable compensation due to them in respect of their rights in and over their respective lands or parts thereof, impaired, or restricted or extinguished by the defendant. The plaintiffs also claimed for damages for each and every breach of the plaintiffs' legal rights under written law and the Federal Constitution as well as general damages.

[4] The defendant is asking the court to decide a number of questions or issues of law as preliminary issues pursuant to O 14A r 1 of the RHC which will eventually dispose of the whole matter of disputes between the plaintiffs

and the defendant. The questions or issues are framed as follows:

(i) Whether s 5(3) and (4) of the Sarawak Land Code (Cap 81) infringe or violate arts 5(1), 8, 13 and 153 of the Federal Constitution and art 39 of the State Constitution of Sarawak and therefore void;

(ii) Whether having regard to the law, facts and circumstances as pleaded by the parties, the plaintiffs are entitled to a declaration that the land (Extinguishment of Native Customary Rights) (Kawasan Kebanjiran Bakun 11) (No 26) Direction 1997, (Sarawak Government Gazette No 1901) which came into force on 23 June 1997 ('the direction') is void;

(iii) Whether the plaintiffs are entitled in law to an order that the government and/or their servants vacate the land claimed by the plaintiffs herein; and

(iv) Having regard to the decisions on issues (a), (b) and (c) above whether the plaintiffs are entitled to the alternative remedies sought herein pertaining to the adequacy of damages for extinguishment of their native customary rights over the affected land as described in the amended statements of claim.

[5] The application is premised on several grounds. Firstly, the issues for determination are core issues or primary issues which are likely to finally or substantially dispose of the plaintiffs' claim. Secondly, the issues are suitable for determination as preliminary issues without full trial of the action. Thirdly, the determination of the issues is likely to save time and costs for all parties concerned. Fourthly, the issues would determine whether the plaintiffs have a cause of action against the defendant.

[6] Before going into the merits of the issues posed in the defendant's application, the first thing to be determined is whether this application is a proper and suitable for determination under the O 14A r 1 of the RHC. That rule provides as follows:

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

[7] The scope of this rule under the English Supreme Court Rules (O 14A) which is in pari materia with our own O 14A was discussed and expounded by the English Court of Appeal in the leading case of *Korso Finance Establishment Anstalt v John Wedge* [Unreported, February 15,1994, CA Transcript No 94/387]. The principles enunciated in that case on the application and scope of the rule was approved and followed by our own Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8. In the *Petroleum Nasional Bhd*'s case, the Court of Appeal also referred to a number of Singapore cases which also applied the principles on O 14A as enunciated in the *Korso Finance*'s case, and said that it was inclined to follow those decisions in its interpretation of the scope of O 14A of the RHC. If I understand the *Petroleum Nasional Bhd*'s case, correctly, the Court of Appeal held that when faced with an application under O 14A, the court must decide what is the threshold issues in the case that require determination; and if the threshold issues are capable of being determined under the rule its determination would be and should be decisive of the whole litigation or essentially the main part of the suit. That it said would result in a substantial saving of time and costs as it would significantly cut down the costs and time involved in pre-trial preparation or in connection with the trial proper. It was held in that case that 'even if the case appeared to or was complicated, it did not mean that the court must shun away from considering the applicability of O 14A and O 33 r 2 of the RHC in relation to the questions of law which were clear and definite'. However at this juncture is worthwhile to bear in mind the words of caution by Sir Thomas Bingham MR in *E (a Minor) v Dorset CC* [1995] 2 AC 633 HL, which were quoted in *The Supreme Court Practice* (1997), Vol 1, Part 1, London, Sweet & Maxwell at p 185 as follows:

> But applications of this kind are fought on ground of a Plaintiff's choosing, since he may be generally assumed to plead his best case … [If] the legal viability of a cause of action is unclear (perhaps because the law is in a transition), or in any way sensitive to the facts, an order to strike out should not be made. But if, after argument, the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts [are] the claim is bound to fail for want of a cause of action, I see no reason why the parties should be required to prolong the proceedings before that decision is reached.

[8] It was also noted in the same Vol 1 of the *Supreme Court Practice* that the above words of Sir Thomas Bingham MR was approved by the House of Lords in another appeal heard at the same time that is the case of *X (Minors) v Bedfordshire County Council* [1995] 3 All ER 353. It was also said that where the law is not settled but is in a state of development it is normally inappropriate to decide novel questions on hypothetical facts; however where the construction of statutes is conclusive this is not so.

[9] On the above principles, counsel for the plaintiffs submitted that the questions or issues posed by the defendant are not appropriate for determination under O 14A. Citing a decision of the High Court of Hong Kong in *Rockwin Enterprises Ltd v Shui Yee Ltd* [2003] 3 HKC 174, he argued that it is important to emphasise that the questions of law or construction is one that is suitable for determination without a trial. In other words, the court must have all the necessary facts and matters before it in order to determine the questions of law or construction. Where the court is not seized of all relevant facts, it would be an extremely rare case (if ever) in which the procedure under O 14A would be adopted. He further submitted that O 14A is only for questions of law where no facts are required to be proved or purely issue of construction. Learned counsel for the plaintiffs submitted that O 14A is not suitable where issues of facts are involved. In this respect counsel for the plaintiffs submitted that in this case the issue of NCR in the plaintiffs' claim is very much alive; and to establish NCR one must go into the historical background and therefore issues of facts are involved. He submitted that para 16 of Bagi's affidavit affirmed on 22 October 2007 raises three issues and all these issues are issues of fact. Furthermore he submits, the sub issues raised in para 17 of the same affidavit affirmed by Bagi (the first plaintiff) show that the issues of law are not simple question of law. To decide these issues, the facts are important and need to be considered.

[10] The issues raised in para 16 of Bagi's affidavit are issues posed by the defendant for determination in this application. The sub issues are the issues proposed by the plaintiffs for determination but rejected by the defendant. These sub issues are stated in exh BB–5 to Bagi's affidavit. However a perusal of the sub issues shows that they are issues of mixed facts and law. But then again remembering what was said in the *Petroleum Nasional Bhd*'s case, the issue that needs to be decided under an O 14A application must be the dominant issue that will eventually decide the whole matter. The sub issues in this case are not the dominant issues. So they ought not to be decided under the O 14A procedure. The dominant issue in this instant is whether the plaintiffs have NCR over the subject land. Counsel for the plaintiffs argues that this issue requires the consideration of facts. He disagrees with the contention by the defendant that the issue has been abandoned in the re-re-amended statement of claim redated 13 November 2007 when the plaintiffs deleted the first prayer that sought declaration that the plaintiffs have native customary rights over the land along Batang Balui and its tributaries. He argues that the issue is still alive if one is to look carefully at the pleadings by the plaintiffs as a whole. In particular he submitted that para 3 of the plaintiffs re-re-amended statement of claim exhibited in the bundle of pleadings in encl 156 speaks of the plaintiffs acquiring the NCR over the subject land resulting from their ancestors' activities over the land and the presence of burial grounds and shrines on the land. He also argued that the said lands are the plaintiffs' source of food, medicine and livelihood.

The plaintiffs pleaded in para 3(d) of the statement of claim that the lands and forests are not just a source of livelihood for the plaintiffs but constitute life itself. They are fundamental to their social, cultural and spiritual survival as native peoples. The said lands are to them a living entity, which is dear and precious, and hold a very deep, cultural and sentimental meaning. Because of this he said that arts 5(1) and 13 of the Federal Constitution are very much interrelated in this instant case. Relying on a passage at p 301 in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 which reads:

> The precise nature of such a customary title depends on the practices and usages of each individual community. And this brings me to the second important point. It is this. What the individual practices and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community. In other words it is a question of fact to be decided (as it was decided in this case) by the primary trier of fact based on his or belief of where, on the totality of the evidence, the truth of the claim made lies.

[11] Learned counsel for the plaintiffs therefore submitted that to answer the questions posed by the defendant in this application they must dwell into the facts in relation to the existence of the NCR over the lands. That requirement makes this instant application unsuitable to be dealt with under O 14A of the RHC.

[12] For the defendant it was submitted that the issue of NCR in this instant case no longer a live issue. It was submitted that both the indorsements on the re-re-amended statement of claim and the amended statement of claim show that the plaintiffs do not seek and have abandoned their claim for the declaration of the NCR over the subject land which was in the original indorsement and re-amended statement of claim. Furthermore it was submitted that in para 13.1 of Bagi's affidavit in reply affirmed on 22 October 2007 the plaintiffs admitted that they are not seeking a declaration that they have customary rights over the subject lands. The parties are therefore bound by their pleadings. In *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 the headnotes read that the issue for trial which arose from the pleadings was whether one K had acquired an indefeasible title by adverse occupation before 30 May 1955. The learned judge held that K had not acquired an indefeasible title before 30 May 1955 but he went on to hold that the continuity of adverse possession was not broken since there was evidence that one Ooi Boon Kay to whom K had transferred her interest in the land went into possession through his agent K. On appeal by the appellant, the Federal Court allowed the appeal and held that the learned trial judge had in that case departed from the strict rules of procedure in deciding the case on an issue not raised in the pleadings and should have dismissed the

claim once he found that K had not acquired an indefeasible title against the owner by adverse possession on or before 30 May 1955.

[13] It was also submitted for the defendant that the plaintiffs, through Bagi's averment in para 11 of his affidavit in reply, had averred that the defendant had no records of certain person, and in reference exh BB–3 in the affidavit had stated in that exhibit that the persons with no record with the defendant as having submitted claims are shaded yellow in the list that was returned to the defendant. It was submitted that under s 5(3) of the Sarawak Land Code and in terms of the Ministerial direction, all persons who wish to claim that they had NCR over the land and to be compensated by the government for the extinguishment thereof, must submit their claims within the stipulated 60 days period. Any person who did not submit their claims, to be supported by documentary evidence, must be deemed to have no native customary rights and accordingly, no right to claim compensation pursuant to the direction. Counsel for the defendant also submitted that as to exh BB–4 in Bagi's affidavit in reply, those persons that were awarded compensation and based on Borang G are not required to refer the matter to arbitration. In fact he says exh BB–4 proves that the defendant recognises the two persons whose documents formed part of exh BB–4 had native customary rights and therefore there was no necessity for the plaintiffs to seek a declaration that they had such rights. Accordingly, counsel for the defendant submits that the matters raised in paras 11 and 13 of Bagi's affidavit in reply affirmed on 22 October 2007 are irrelevant and should not affect the consideration of this instant application under O 14A of the RHC. The issues raised are questions of law arising from the pleadings and may be decided as dominant issues which will determine the outcome of the plaintiffs' claim once and for all. The consideration of the issues does not require any further investigation into the facts of the case as contended by the plaintiffs.

[14] I am inclined to accept the submissions by learned counsel for the defendant that the issues raised in this application are fit and proper for determination under O 14A of the RHC. From the amended statement of claim it is obvious that the plaintiffs no longer seek a declaration that they have NCR over the subject land. In the re-amended statement of claim this prayer, which was originally there, was deleted. This indicates that the plaintiffs no longer pursuing the declaratory remedy on this issue and had in fact abandoned it. The law as stated above is settled and clear; that parties are bound by their pleadings. Therefore with the deletion of the declaratory remedy as to the NCR as originally sought in the plaintiffs' statement of claim, the plaintiffs should not be allowed or ought not to be allowed to adduce any evidence as to the existence of NCR over the subject land. I think the existence of NCR over the subject land must be taken to be there and

recognised by the defendant before the publication by gazette notification of the Ministerial direction to extinguish it. This has to be so; otherwise why would there be a necessity on the part of the defendant to issue such direction to extinguish the same.

[15] In the plaintiffs' amended statement of claim the plaintiffs are challenging the extinguishment of the NCR by the direction made pursuant to s 5(3) and (4) of the Sarawak Land Code. In para 16 of the Bagi's affidavit in reply the plaintiffs questioned the constitutionality of the exercise of the Ministerial power under s 5(3) and (4) of the Code to issue the direction having regard to the right to life and livelihood under art 5 of the Federal Constitution and the right to equality under art 8 of the Federal Constitution. The plaintiffs also questioned the legality and constitutionality of the direction in view of the fact that the defendant did not accord the plaintiffs a procedural fairness before the extinguishment was made. In other words the plaintiffs are saying that they are entitled to a right to be heard before the Ministerial direction was made. But is this so? The plaintiffs also asked whether in deciding to extinguish the rights under s 5(3) and (4) of the Sarawak Land Code the defendant is obligated to provide for adequate compensation having regard to art 13 of the Federal Constitution. To my mind, these are questions of construction of the relevant provisions of the written statutes including the provisions of the Federal and State of Sarawak Constitutions.

[16] Learned counsel for the plaintiffs however urged on me to follow the decision of the High Court in *Kerajaan Negeri Terengganu v Petroliam Nasional Bhd & Anor* [2003] 1 MLJ 260 where Arifin Zakaria J (as he then was and now a Federal Court judge) had ruled that O 14A and O 33 of the RHC procedures should apply only in clear and simple cases and that that case was far from being a plain and simple case; it raises a number of complex legal issues involving, among others, the interpretation and construction of Federal and State Constitutions, international conventions, Petroleum Development agreement and a number of other statutes. Therefore the learned judge in that case concluded that witnesses may need to be called to support the plaintiffs' claim that the first defendant in that case had unfairly discriminated against the plaintiffs, and also to show how far reaching the effect of the defendant's action on the plaintiffs. Learned counsel for the plaintiffs submitted that though the judgment of the High Court in that case was set aside on appeal by the Court of Appeal (see *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8); the Court of Appeal has approved the principles of law as stated by the learned judge at the High Court in that case.

[17] That may be so. But careful reading of the Court of Appeal's judgment in that case shows that the Court of Appeal disagree with the learned High Court judge then that the application under O 14A in that case was inappropriate and that the matter should be decided at a full trial. At paras 28 and 29 of the Court of Appeal's judgment which are found at p 25 of the report the court said this:

> We agree with the learned judge in holding that the plaintiff ought to be given the opportunity to adduce evidence as to the factual background leading up to the execution of the vesting instrument and the principal agreement. However, we are of the view that, having regard to the pleadings, the agreed facts and the facts to be determined by this court as agreed facts and the then existing relevant legislations and other relevant documents, it will suffice if that evidence is adduced through affidavits. However, such evidence must be restricted only to what is necessary for the purpose so that the record will not be that bulky. We agree with the plaintiff's learned counsel's reliance on the proviso (f) of s 92, ss 95, 97 and 98 of the 1950 Act to justify the need for evidence to be adduced. We only agree on principle but as to the merits of his contention, that is to say, whether his contention hold water is to be subsequently determined by the learned trial judge. However we are of the opinion that, on similar basis as aforesaid, it will be adequate if that evidence is adduced through affidavits and it must be limited solely to what is essential for the purpose.
>
> However, in our view, the fact that affidavit evidence is allowed to be adduced on the aforesaid restricted matters for the limited purpose should not impair our consideration on the merits of the defendants' applications. The merits of the application is a separate matter altogether from the liberty of the plaintiff to adduce affidavit evidence because affidavit evidence is permissible both under O 14A (see *The Supreme Court Practice* 1999 Vol 1 para 14A/2/8) and under O 33 r 2 of the RHC by reason that the trial of question or issue in a cause or matter includes of fact or partly of fact as well.

[18] It is obvious from the reading of the above two passages from the judgment of the Court of Appeal in the *Petroleum Nasional Bhd*'s case, the question of facts which are necessary for proper understanding of the issues for determination under O 14A may be adduced through affidavit evidence.

[19] When faced with a case which facts are complicated or some of it are disputed the Court of Appeal's advice to the judge hearing an application under O 14A is found in the passage at p 28 para D to p 29 para A of the judgment which reads as follows:

> With that factor in mind, what ought to have been done by the learned judge, not as a matter of choice but in the exercise of discretion, is, at the outset, to scrutinise the pleadings to discover what material facts are not obviously in dispute, what facts the parties may agree after discussion and submission, with variation or otherwise and as the last resort to compel either party or both to accept the material facts, which the court thinks obviously should not be disputed. In our

view, the last recourse, though drastic, is proper and permissible. We say so because under our O14A r 3 the caveat placed upon the court is merely to give the parties the opportunity of being heard on the question; but, there is a slight difference in the English civil procedure where under O 14A r 3(b) the alternative caveat placed upon the court is that the parties must consent to an order or judgment on such determination. Whatever rational behind it we are unable to comprehend. However, the learned judge did not do as what ought to have been done. He just accepted the fact that the plaintiff did not agree to the proposed statement of agreed facts (Appendix B) as distilled by the defendants from the pleadings and the applicable legislations. Having embarked on the exercise as he ought to have done, he should consider whether the undisputed or agreed facts are comprehensive and sufficient to determine and dispose off the core or primary issues. If they are comprehensive and sufficient he ought to have allowed the questions to be determined first, either with modification or otherwise, and if the undisputed facts so discovered are also sufficient not only to cover the subsidiary issues as reflected in the two extra questions posed by the first defendant but also the other causes of action of the plaintiff he should proceed to frame, either with the assistance of the parties or otherwise, other questions relevant to the issues and the causes of action and add those questions to the list for determination. Under such circumstances, there will be no necessity for further investigation of facts because: (i) only material facts, not evidence, must be pleaded and point of law raised in the pleadings (O 18 r 7(1) and r 11 of the RHC); and (ii) the plaintiff being the respondent to an application under O 14A is not entitled to contend that it should be allowed to hunt around for evidence or something that may turn up on discovery which can be relied upon to explain to modify the meaning of the relevant document (see *Korso Finance Establishment Anstalt v John Wedge*). By such exercise, there should be no risk of injustice to the plaintiff if proper determination on those questions is made because the applications are fought on the ground of the plaintiffs choosing, since it may generally be assumed to plead its best case (by analogy, re-statement of Sir Thomas Bingham MR in *E (a minor) v Dorset County Council, X & Ors (Minors) v Bedfordshire County Council)*.

[20] In the same judgment the Court of Appeal also states that in exercising proper discretion whether or not to entertain an application under O 14A of the RHC it is incumbent on the judge hearing the application to identify and properly appraised the material facts pleaded which are obviously undisputed or which should not have been disputed including any admissions. If after having done that the judge discovered that such facts are comprehensive and sufficient he should consider hearing the application. If otherwise, the judge should consider whether he is in a position to determine the core or primary issue and/or some or all of the subsidiary issues and causes of action. If he is in a position to do so, he should then frame additional questions or drop or recast the questions framed as he thinks fit and proceeds to determine the issues and causes of action. However if the judge is not in a position to do so, he should consider whether any question or issue of fact or partly of fact and partly of law should be tried first, although this process may result in split

trials which is permissible either under O 14A or O 33 r 2 of the RHC. The rational for this I believe is explained in the following passage in the judgment found at pp 29–30:

> An early disposal of the present application would place the parties in a clearer position as to whether anything farther needs or ought to be done in the conduct of the case. It was further held that the trial of the preliminary issues/questions would further clarify the complex issues that face the court in determining this suit. However, it is within his discretion whether or not to adopt that course and if he thinks that the process is cumbersome and does not serve the objective and purpose of the orders, then only he is entitled to dismiss the applications. That is, in our view, the proper or judicious exercise of discretion required.

[21] For the above reason I think the Court of Appeal concluded that the complexity of the case should not be the reason for the court to shun away from considering the applicability of O 14A and O 33 r 2 in relation to the questions of law posed which are clear and definite and the issues are clear cut.

[22] Applying the above principles and after having regard to the pleadings in this case I am satisfied that the issues posed by the defendant for determination in this application are appropriate to be determined as preliminary issues that will eventually dispose of the matter. The material facts that are required for such determination are sufficiently pleaded in the pleadings. The fact that the plaintiffs are no longer seeking a declaratory relief that they have NCR over the subject lands makes it all the more plain that there is no controversial or disputed facts that would require further oral evidence at a trial to enable the issues to be determined under the O 14A procedure. With that I now proceed to consider the merits of the application.

[23] On the first issue that is whether s 5(3) and (4) of the Sarawak Land Code and any direction made thereunder violate the provisions of arts 5, 8, 13(2) and 153 of the Federal Constitution or of art 39 of the State of Sarawak Constitution, I will start by stating that I disagree with learned counsel for the plaintiffs' submissions that the law as to customary natives rights, in particular the acquisition of NCR, in Sarawak is still in the state of flex. In my view the recognition of NCR and the acquisition of it have been clearly provided for in s 5 of the Sarawak Land Code. The law, and this provisions also, has been discussed and stated at length by the High Court and the Court of Appeal in *Superintendent of Lands and Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256. So is their extinguishment. The method by which these rights can be established in a court of law has been laid down by the Court of Appeal in the *Sagong*'s case, as quoted above. On this last point, and in relation to the instant application, it may not be necessary to resort to the method stated to establish the

existence of NCR in this instant case: the reason being that the plaintiffs are no longer seeking a remedy for declaring the existence of such rights. Looking at the pleadings in this case it appears to me that plaintiffs already have that rights, and the defendant have accepted that fact. Therefore the subsistence of the NCR over the lands before the making of the direction is not really in dispute.

[24] Next I shall state that when faced with the issue of constitutionality of a provision of a statute, the court should be slow in striking down the impugned provisions for being unconstitutional. Instead the court should attempt to harmonise the impugned provisions to bring it in line with the provisions of the Constitution which the impugned provisions were said to have violated. In this respect it wise to recall the words of Jeevan Reddy J in *State of Bihar & Ors v Bihar Distillery Ltd* AIR 1997 SC 1511 which were quoted by the learned judge Gopal Sri Ram JCA in *Sagong*'s case at p 310 as follows:

> The approach of the court, while examining the challenge to the constitutionality if an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it.

[25] Now to answer the question: is the direction issued in this case in violation of the constitutional provisions as claimed by the plaintiffs and thereby rendering it unconstitutional and void? In *Jalang Anak Paran & Anor v Government of the State of Sarawak & Anor* [2007] 1 MLJ 412 the High Court in Kuching was faced with the same question in respect of a similar Direction under the same provision of the Code over a piece of land at Ulu Batang Tatau. In answering that question the court in that case considered the scope of the various relevant Articles of the Federal and State Constitutions which are the same Articles that are under consideration in this case.

[26] In *Jalang*, the High Court there recognised the submissions by counsel for the plaintiff in that case that the native customary rights are fundamental rights which are protected by art 5 of the Federal Constitution and that they are more than a right to property and in fact are a right to life which encompasses the right to livelihood and all the facets that are integral part of life itself. However, nothwithstanding that the court in *Jalang*, ruled that native customary rights can be taken away by laws passed by the Federal Parliament or State Legislature provided that the languages employed in those laws are clear and unambiguous and also compensation is paid for the extinguishment. Though the ruling in *Jalang*, is not binding on me, it being a decision of a court of co-ordinate jurisdiction as mine; it is however a very persuasive authority and on the authority of *Tengku Razaleigh bin Tengku*

Mohd Hamzah v Election Judge For Election Petition No 33–6–1995 & Ors [1996] 4 MLJ 66 which applied a dicta in the Federal Court's case of *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211, I need a very good reason to depart from the ruling in that case on a similar issue. There is another reason why I should be slow in disagreeing with the learned judicial commissioner (as he was then) in *Jalang*, on this issue. It is this: the High Court in *Jalang*, did not arrive at the above conclusion on its own. It had some help from the decision of the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256. Of course *Nor Anak Nyawai*, being a decision of a superior court, is binding on me as it was binding on the High Court in *Jalang*. In the circumstances I agree with the conclusion in *Jalang*, that though the common law respects the pre-existence of rights under native laws and customs, such rights may be taken away by clear and unambiguous words in a legislation.

[27] Section 5(3)(a) of the Sarawak Land Code provides:

> (3) ...
>
> (a) Any native customary rights may be extinguished by direction issued by the Minister which shall be —
>
> (i) published in the Gazette and one newspaper circulating in Sarawak; and
>
> (ii) exhibited at the notice board of the District Office for the area where the land, over which such rights are to be extinguished is situate,
>
> and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the Government:
>
> Provided that where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights in accordance with paragraphs (b) and (c); or other land over which such rights may be exercised may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

[28] It is crystal clear from the reading of the section that a customary rights may be extinguished in the manner stated in that section provided that compensation or alternative replacement land with the same rights with or without additional compensation is paid or made available to any persons whose customary rights are affected by the direction made under the section to extinguish the rights. I do not know how much clearer the language of a

statute must be before it can be said that it is constitutional to take away such customary rights. In my opinion the language used in s 5(3) of the Sarawak Land Code is clear enough to permit the extinguishment of native customary rights with provisions for compensation.

[29] Article 13(1) of the Federal Constitution provides that no person shall be deprived of property save in accordance with the law. The laws with which we are concerned here is the Sarawak Land Code, in particular s 5(3) and (4) which govern the extinguishment of natives customary rights. At this juncture it is pertinent to bear in mind that the property we are dealing with in this case is not property in the sense of it being a registered property or land with title being registered in the names of the plaintiffs. The property is a communal property recognised under common law and statute but without any title being registered to anyone. The property in this case, which is the lands with NCR, is state lands. And under s 5(1)(i) of the Sarawak Land Code it is clearly provided that until a document of title has been issued, such land shall continue to be state land and any native lawfully in occupation thereof shall be deemed to hold the same by licence from the government. Thus the extinguishment under s 5(3) of the Sarawak Land Code is not extinguishment of the plaintiffs' title to the NCR lands. The extinguishment is an extinguishment of the plaintiffs' rights to use the lands as native customary lands.

[30] Article 13(2) of the Federal Constitution provides that no law shall provide for compulsory acquisitions or use of property without adequate compensation. In cases of customary native lands without title over which customary natives rights subsist, the issue of acquisition does not arise. This is because the lands never belonged to the natives. They belong to the state. The effect of an extinguishment order or direction made under s 5(3) of the Sarawak Land Code only extinguishes the natives right to use the lands; and not taking the lands away from them since the lands were never theirs in the first place. In this instant case it is not the plaintiffs' case that they were the registered owners of the lands involved. Nevertheless the law still requires the natives that have been deprived of their right to use the lands to be compensated. In this respect, s 5(3)(b) of the Sarawak Land Code provides for the manner in which compensation may be claimed and sub-s (4) of the same section provides for reference to arbitration by any person who is dissatisfied with the decision by the Superintendent on the compensation claim.

[31] Article 13(2) uses the expression 'adequate compensation'. The proviso to s 5(3) of the Sarawak Land Code, does not use that expression; the proviso contains a simple expression 'compensation'. Does that make the provision unconstitutional? I do not think so. The question 'adequate compensation' is

a question of mix fact and law. The legal question is: what is the expression 'adequate compensation' means in law? And the factual question is: on the facts and circumstances of a given case is the compensation awarded adequate? I believe that compensation for acquisition of property and compensation for deprivation of use of property as in the case of extinguishment of natives customary rights ought to be on different basis. In the one case, the registered owner of the property has absolute right to deal with his property in any manner permissible under the law, had it not been for the compulsory acquisition. He is deprived of this absolute right by the compulsory acquisition. In the other case, the natives cannot deal with the property as they like. For example they cannot sell the property. They are only licensees on the property. When the rights are extinguished they are deprived of the use of the property. For example they can no longer farm on the land or do hunting. Therefore different considerations are to be taken into account when computing the compensation for such loss. Thus an amount of compensation may be considered adequate in one case but not the other.

[32] In *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 the Court of Appeal was confronted with the legality of ss 11 and 12 of the Aboriginal Peoples Act 1954. Under s 11(1) of the Act, it was provided that 'compensation shall be paid … as shall appear to the state authority to be just'. Subsection (2) of the same section provides that any compensation payable under sub-s (1) may be paid in accordance with s 12. The problem in that case is s 12. This is because the language of that section seems to suggest that the payment of compensation to the aboriginal people whose area or reserve or land has been excised, alienated, granted or leased for any purpose is discretionary on the part of the State Authority. This is so because the expressions used in that s 12 are 'may grant compensation therefor' and 'may pay such compensation'. The word 'may' in law is ordinarily taken to be discretionary exercise of power or authority. The Court of Appeal in that case, in order to save the section from being struck down as unconstitutional, had read into it the word 'shall' for the word 'may' and the word 'adequate' to go along with the word 'compensation'. The rationale for doing so is to bring the section in harmony with art 13(2) of the Federal Constitution. The learned judge Gopal Sri Ram JCA, who delivered the judgment of the Court of Appeal explained the rationale in the following words:

> I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. But here you have a direction by the supreme law of the Federation that such modifications as the present must be done. That is why we can resort to this extraordinary method of interpretation.
>
> A not dissimilar approach was taken in *Assa Singh v Menteri Besar Johor* [1969] 2 MLJ 30. In that case, the former Federal Court was concerned with the validity of the Restricted Residence Enactment (Cap 39 of the Laws of the Federated Malay

States). The task of the court in that case was much lighter than the one we face here. That is because the Enactment did not contain any provision that violated the fundamental rights prescribed under art 5 of the Federal Constitution. So the way in which the court carried out the modification was to read the Enactment as being subject to those rights. Suffian FJ made that quite clear in his judgment. He said:

> Answering the second part of the question posed, even assuming that the Enactment is inconsistent with the Constitution, I say that the Enactment is not void but that it must be applied with modifications to bring it into accord with the Constitution. *To bring it into accord with the Constitution, there must be read into the Enactment the constitutional rights conferred on an arrested person by art 5*
>
> (Emphasis added.)

This is indeed the approach I have adopted in para 37 of this judgment.

[33] Taking the same approach, I think s 5(3) and (4) of the Sarawak Land Code can be saved from being struck down as unconstitutional for violating art 13(2) of the Federal Constitution by reading the expression 'compensation' in that section to mean 'adequate compensation'. I think this is permissible not only because the Court of Appeal had done so but also because the obligation to provide for and pay compensation is already expressly embodied in that section. Also it is a cannon of construction of statutes that where there is inconsistency between two statutory provisions then the interpretation of the purported inconsistency must be done in such a way so as to harmonise the two provisions.

[34] Is s 5(3) and (4) of the Sarawak Land Code unconstitutional because it violates art 5 of the Federal Constitution in that the extinguishment of the NCR deprived the plaintiffs of their livelihood? In *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener)* [2004] 2 MLJ 257 it was said at p 267 that:

> [I]t is a recognised canon of construction that a Court should proceed on the assumption that no conflict or repugnancy between different parts of the Constitution was intended by its framers.

and that:

> [T]he constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provision. It is an established canon of constitutional construction that no one provision of the constitution is to be separated from all the others, and considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.

On the forgoing principle arts 5 and 13 of the Federal Constitution ought to be read together and given a harmonious interpretation to avoid any repugnancy or conflict. In this respect I agree with the submission of the defendant that when read together, the two articles would mean that where a person is deprived of property, but not his life or liberty, even though that property may be important to his livelihood, the deprivation of the property is not unconstitutional, so long as there is adequate compensation for his loss of property which would take into account, amongst other things, the loss of use of the property from which he may be able to derive his livelihood. As mentioned earlier s 5(3) and (4) of the Sarawak Land Code contain provisions as to compensation. In the event that the adequacy of the compensation is being disputed, the same provision provides for its determination by an independent arbitrator.

[35] As to the question of s 5(3) and (4) of the Sarawak Land Code being discriminatory and therefore violates art 8 of the Federal Constitution, I do not think there is any issue to it. Article 8 had been discussed and considered by the Federal Court in *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 and the court said that:

> [A]ll that Article 8 guarantees is that a person in one class should be treated the same as another person in the same class, …

In other words the court says the law may differentiate one class or category of person from another category or class and attaching to each class or category different rights and liabilities. And it is not discriminatory and in violation of art 8 if a person in one class or category is treated differently from a person of another class or category so long as the person in the same class are treated equally. In this regard I agree with the view expressed by the learned judicial commissioner (as he was then) in *Jalang*'s case, that:

> ... there is no discrimination as the impugned sections confined themselves to non titled land held by natives only whereas Part VI of the Code is confined to titled lands held by natives as well as non-native.

[36] Regarding the argument that s 5(3) and (4) of the Sarawak Land Code are in violation of art 153 of the Federal Constitution and art 39 of the State of Sarawak Constitution, I find it has no merits at all. Article 39 of the State Constitution and art 153 of the Federal Constitution deal with the protection of the special position and prerogatives of the natives in respect of employment, grant of permits or licences for any trade or business, scholarships and educational or training privileges. The two articles do not

deal with the rights of natives on their land which has been acquired or extinguished by the government. A

[37] For the above reasons it is my opinion that s 5(3) and (4) of Sarawak Land Code are not unconstitutional. B

[38] But is the direction made under it unconstitutional because the defendant, as alleged by the plaintiffs, had not complied with procedural fairness? C

[39] The term 'procedural fairness' in public law means a public opinion maker is obliged to act fairly and with fairness in arriving in its decision, particularly so when exercising its discretion. Procedural fairness is therefore a principle applied by the courts in judicial review cases to strike down decisions which were challenged on this ground if the courts find there is merits to the challenge raised. Procedural fairness here means fairness in accordance with the substantive and procedural laws underlying the decisions made. For a brief discussion on this principle reference may be made to the case of *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487 (HC) and *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 (CA). D E

[40] In the strict sense of the expression, it means that the procedure provided in the statute for doing certain acts must be followed and complied with. Failure to do so would render the acts done unlawful or illegal. F

[41] In this respect, it is noted that the impugned provisions of the Sarawak Land Code under which the direction was made does not prescribe any specific procedure as to the manner in which the direction was to be made except that it must be made by a Minister (in charge of land matters) and is gazetted and that the direction must contained statement as to payment of compensation. G

[42] In its broadest sense the expression means that the procedure to be followed in arriving at a decision must comply with the requirement of the principles of natural justice. If the procedures adopted and followed failed to meet this requirement the procedure itself may be struck down as void. What this means is that in appropriate cases the person likely to be affected by the decision made ought to be given the opportunity to be heard before the act is done or the decision made. It also implies that a decision maker must give reasons for his decisions: *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* [1996] 1 MLJ 481. H I

[43] But this concept is not rigid, it is flexible and elastic — MP Jain, *Administration of Law of Malaysia & Singapore* (3rd Ed) at p 289. Its application varies according to the context of the case.

[44] The line of authorities on this subject seems to suggest that the concept would apply quite strictly where liberty and personal rights of individuals such as detention under the law, revoking of licences and the likes, are affected. In others it may not be so rigidly applied. It will also be applied rigidly if the decision by the decision maker is judicial or quasi judicial in nature (see *Ridge v Baldwin* [1963] 2 All ER 66; *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 (FC)).

[45] However the case of *Mohamed v Commissioner of Lands & Mines, Terengganu & Anor* [1968] 1 MLJ 227 (FC), may be cited as authority that the rule of natural justice (which includes the requirement for procedural fairness) applies to determination of Malay customary law in respect of 'Harta Sapencharian Laki Bini'. But the decision in that case may be distinguished from the present case on its special facts. In that case, the law which is the Trengganu Land Enactment 1357, contains provision as to hearing and recording of evidence by the Collector, and an appeal provision against the Collector's decision to the Commissioners of Lands and Mines. Also, in that case, the issue was the right of the second respondent therein to half of the land obtained or acquired by the second respondent and the appellant during the subsistence of their marriage.

[46] In our instant case, there is no such issue or provisions of the law. The right to the land is a communal rights and not individual rights. Though the impugned provisions of the Sarawak Land Code do not have any provision for the natives to be consulted or heard before the Minister decides to extinguish the NCR and make a Ministerial direction to that effect by publishing it in the *Gazette*, it does not render the provision unconstitutional. The decision to extinguish the NCR under impugned provisions is an exercise of administrative discretion depending on the exigency and expediency of the state. It is not an exercise of judicial or quasi judicial discretion. The administrative discretion may be exercised for so long as provision for compensation is provided for as required by the impugned provisions.

[47] In my view land development and planning for land use in the state is the prerogative of the state. The state needs to act with speed and expediency when planning for the development of the state for the good of the public. This speed and expediency would be lost if the state is required to accord a right to be heard to every native who claims to have rights to use state land over which NCR is said to subsist before gazetting a direction

under the impugned provisions to extinguish such rights over land required for development. This will impede the state in carrying out its planning for land development and land use in state particularly, and the development of the state generally since land is one of the most important factors in development planning.

[48] For the foregoing reasons, it is my view that under the impugned provisions of the Sarawak Land Code, the state is not obliged to accord the natives the right to be heard before issuing the direction to extinguish the NCR. All the State needs to do is to comply with the letter of the statutory provisions which is to gazette the direction for the extinguishment of NCR and to provide adequate compensation for those natives affected by it.

[49] Accordingly therefore the direction made under the impugned provisions extinguishing the NCR over the plaintiffs' land is lawful and valid and not void for being unconstitutional.

[50] The third question posted by the defendant for determination is whether they are entitled in law to an order that the government or its servants/agents vacate the land claimed by the plaintiffs. Section 29(1)(b) of the Government Proceedings Act 1956 provides as follows:

> (b) in any proceedings against the Government for recovery of and or other property the court shall not make an order for recovery of the land or the delivery of the property, but in lieu thereof, make an order declaring that the Plaintiff is entitled as against the Government to the land or property or to the possession thereof.

[51] Thus any order made in contrary to the abovementioned provision is liable to be struck down or set aside on appeal: see *Pemungut Hasil Tanah Daerah Barat Daya (Balik Pulau) Pulau Pinang v Kam Gin Paik & Ors* [1983] 2 MLJ 390 FC.

[52] Counsel for the defendant submitted that an order for the defendant or its servants or agents to vacate the land in question would tantamount to the defendant delivering vacant possession thereof to the plaintiffs and thus would offend s 29(1)(b) of the Government Proceedings Act 1956. I agree. In the premises such order should not be made. The alternative declaratory order that the plaintiff is entitled as against the government to the land or possession thereof also cannot be made in this instant case. The reason is that the lands in question in this case are untitled lands. The plaintiffs are only licensees. The lands had all along, except for the licence until it was revoked, been state lands.

[53] The final question by the defendant is whether, having regard to the court's findings on the first three questions posted earlier, the plaintiffs are entitled to the alternative remedies pertaining to the adequacy of damages for extinguishment of their native customary rights over the affected lands. I think the answer to this question is quite obvious. We have seen s 5(3) of the Sarawak Land Code makes provision for payment of compensation; and s 5(4) of the same Code allows an aggrieved party to refer any decision, including the adequacy of the compensation paid under sub-s (3), to arbitration. These provisions in my view amply answer this final question in a positive way. We also have seen that the expression 'compensation' in sub-s (3) of s 5 of the Sarawak Land Code must be read, following the Court of Appeal dictum in *Sagong Tasi*'s case, to mean adequate compensation. However, for the plaintiffs to be entitled to this adequate compensation, the plaintiffs must comply with the requirement of sub-s (3) of the said section as to the manner of making a claim for compensation.

[54] In passing and before I signed off, I shall say something on the procedural objection taken by the defendant as to the plaintiffs' claim. The defendant had argued that the plaintiffs are seeking an order that question the validity of the Ministerial direction made in this case. Therefore the defendant said the plaintiffs should have proceeded by way of judicial review under O 53 of the RHC and asked for an order of certiorari to quash the Ministerial direction in question. The defendant further argued that by filing a writ action seeking declaration to declare the Ministerial direction as void and unconstitutional the plaintiffs had adopted the wrong procedure. The plaintiffs contend otherwise; and arguing that the two remedies, declaration and certiorari are not mutually exclusive. They are concurrent remedies, said the plaintiffs. I agree with the plaintiffs. The point has been settled by the Federal Court in *Teh Guan Teik v Inspector General of Police & Anor* [1998] 3 MLJ 137 cited by the defendant. In that case, and at p 147 of the reported judgment, Peh Swee Chin FCJ, one of the judges that delivered the judgment in that case said:

> Was the Court of Appeal correct in holding the way it did as stated above ie that the procedure by way of declaration was wrong, and that the correct way was by way certiorari?
>
> With very great respect, the view of the Court of Appeal is totally against the weight of authorities and established principles.

[55] And then at p 148 of the same report the learned judge said this:

> The entrenched principle that declaration and certiorari are not mutually exclusive and are concurrent remedies was asserted several times pointedly in the United Kingdom followed by our courts.

[56] The learned judge also remarked in his judgment that 'to dislodge such a remedy by declaration from its entrenched position, it would require clear and strong words from a statute'.

[57] Be that as it may, I do not think that the plaintiffs ought to be granted the declaration. This is because there has been a long delay of about three years before the plaintiffs come to court. The Ministerial direction was made in 1997; the plaintiffs filed this suit only in 2000. There is no explanation provided by the plaintiffs for the delay. Declaration being a discretionary remedy, the court may not grant it if the plaintiffs sit on its right and delay in seeking relief.

[58] In the final analysis therefore, I will answer the first three questions by the defendant in this application in the negative. As to the fourth and final questions, the answer is an affirmative 'yes'. Costs of the application is given to the defendant and costs to be taxed unless agreed.

Allowing defendant's application with costs.

Reported by K Nesan